

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 30 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

AIRONG DU,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 03-74516

Agency No. A77-378-730

MEMORANDUM*

JING JING,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 03-74518

Agency No. A77-378-729

On Petition for Review of an Order of the
Board of Immigration Appeals

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Submitted November 14, 2005**
Pasadena, California

Before: WARDLAW and PAEZ, Circuit Judges, and SINGLETON.***

Jing Jing, and his wife, Airong Du, natives and citizens of the People's Republic of China, petition for review of an order of the Board of Immigration Appeals ("BIA"), which affirmed without opinion an immigration judge's ("IJ") denial of their applications for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). We review the IJ's decision as the final agency determination. *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 (9th Cir. 2003). We grant the petition and remand to the BIA for further consideration of petitioners' applications for relief.

Jing challenges the IJ's adverse credibility finding. We review an adverse credibility determination for substantial evidence. *Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002). Speculation and conjecture cannot form the basis of an adverse credibility determination. *See Bandari v. INS*, 227 F.3d 1160, 1167-68 (9th Cir. 2000). Here, the IJ found it incredible that Jing was able to return to his government job after having been detained and beaten, and that he was able to

** This panel unanimously finds this case suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2)*.

*** The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

obtain a valid passport and visa from a friend while he was under constant surveillance and police investigation. The IJ's adverse credibility findings, however, were based on personal conjecture. They were not supported by substantial evidence in the record. *See Ge v. Ashcroft*, 367 F.3d 1121, 1125-26 (9th Cir. 2004) (finding that an adverse credibility determination was not supported by substantial evidence where it was based on "IJ's personal conjecture about what Chinese authorities would or would not do" and about how Ge was able to obtain travel documents).

Although the IJ suggested that even if Jing was credible he nonetheless failed to establish a well-founded fear of persecution, the IJ did not address whether Jing suffered past persecution. Rather, the IJ concluded that because Jing was not credible, he "failed to satisfy his burden of showing that he has suffered past persecution." In light of Jing's two week detention coupled with beatings, electric rod shocks, forced head shaving, and pouring of cold water on his head, Jing established that he suffered past persecution. Accordingly, Jing is entitled to a presumption of a well-founded fear of future persecution and the government bears the burden of rebutting this presumption. *See Delosa v. Ashcroft*, 393 F.3d 858, 863-64 (9th Cir. 2005). The IJ, however, failed to consider Jing's claims in light of

the shifting burden on the government, which in turn undermines her determination that there was no well-founded fear of future persecution.

“It is the well-settled law of this circuit that eligibility for asylum may be based on past persecution alone, even absent a well-founded fear of future persecution.” *Lopez-Galarza v. INS*, 99 F.3d 954, 959 (9th Cir. 1996) (internal quotations and citation omitted). Because the source of Jing’s persecution was the government, Jing may be eligible for humanitarian asylum on the basis of past persecution under 8 C.F.R. § 1208.13 (b)(1)(iii)(A). *See Belishta v. Ashcroft*, 378 F.3d 1078, 1081 (9th Cir. 2004) (order). When evaluating whether to grant humanitarian asylum, an IJ must consider, in addition to the likelihood of future persecution, “all other factors, both favorable and adverse.” *In re Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989); *see also id.* (“there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution.”). Because the IJ found that Jing was not credible, she could not have properly considered all of the factors relevant to this inquiry, such as the severity of Jing’s past persecution. *See Lal v. INS*, 255 F.3d 998, 1005, *amended by* 268 F.3d 1148 (9th Cir. 2001) (holding petitioner eligible for humanitarian asylum based on severe past persecution).

Therefore, we grant the petition and remand to the BIA so that it can decide, in the first instance, whether petitioners are eligible for asylum, withholding of removal, or relief under the CAT. *See INS v. Ventura*, 537 U.S. 12, 16-18 (2002). The agency shall make this determination in light of Jing's credible testimony.

Petition **GRANTED** and **REMANDED** for further proceedings consistent with this disposition.